UTAMA MERCHANT BANK BHD

v.

DATO' MOHD NADZMI MOHD SALLEH

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[SUIT NO: D4-22-1248-2000]
13 AUGUST 2003

CIVIL PROCEDURE: *Trial - Right to begin - Whether defendant - Whether burden of proof on pleadings lay with defendant - Rules of the High Court 1980, O. 35 r. 4(1)*

The plaintiff brought a case against the defendant for a term loan facility that was advanced to the defendant by the plaintiff. The plaintiff now sought the direction of the court under O. 35 r. 4(1) of the Rules of the High Court 1980 ('RHC') that the defendant should begin the trial first as the burden of proof on the pleadings lay with the defendant.

The issues were: (1) whether the burden of proof on the pleadings lay with the defendant; and (2) whether the court should defer making a ruling thereto until the case management was fully completed.

Held:

[1] According to *Seldon v. Davidson*, the party who should begin the trial would be the party on whom the burden of proof on the pleadings lies. In the present case, the defendant did not deny the term loan facility granted to him by the plaintiff. He also did not deny he had accepted the loan and received the money. His defence was one of confession and avoidance, ie, he confessed that he took the money but claimed that he was excused from repaying because of certain independent facts. The defendant should therefore prove those independent facts first before the plaintiff was called to answer them. It followed that the burden of proof of those facts must lie with the defendant and that he should begin his case first. (pp 862 b & 874 d-f)

[2] The court need not defer making a ruling as to which party should begin until the case management of this case was fully completed. Case management under O. 34 r. 4(2)(a) to (m) of the RHC is an ongoing process and this court would only fix the date for hearing of the whole

suit after the parties had complied with all the directions of this court. In the meantime, the parties were free to file any interlocutory applications and the courts were required to hear those interlocutory applications expeditiously. (p 874 g)

[Defendant to begin his case first.]

Case(s) referred to:

Alexander v. Rayson [1936] 1 KB 169 ***(refd)***
Constantine Line v. IS Corpn [1941] 2 All ER 165 ***(refd)***
Datuk Chen Lip Keong & Anor v. Datuk Mohd Fathi Hj Ahmad And Another Action [1994] 1 MLJ 1 ***(refd)***
Follagen Ltd (Trading as the Top Hat Restaurant) v. Ritjo Properties Ltd & Anor (The Times 1981) ***(refd)***
International Times & Ors v. Leong Ho Yuen [1980] 2 MLJ 86 ***(refd)***
JL Morison Son & Jones (M) Sdn Bhd v. Yee Fung Sdn Bhd [1997] 1 LNS 340 ***(refd)***
Juahir Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 4 CLJ 1 CA ***(refd)***
Kulandi Muthu v. Subramaniam Velliappan [1983] 1 CLJ 302; [1983] CLJ (Rep) 603 HC ***(refd)***
Lo Khi On (Trading as Fuji Hairdressing Saloon) v. Tanjong Aru Hotel Sdn Bhd [1994] 4 CLJ 550 HC ***(refd)***
Nanyang Development (1966) Sdn Bhd v. How Swee Poh [1970] 1 MLJ 145 ***(refd)***
Seldon v. Davidson [1968] 2 All ER 755 ***(foll)***
Selvaduray v. Chinniah [1939] MLJ 253 ***(refd)***
Tetangga Akrab Sdn Bhd v. Tuan Jawie & Ors [2002] 4 CLJ 171 HC ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 101, 102, 103, 114(g)
Rules of the High Court 1980, O. 34 r. 4(2)(a)-(m), O. 35 r. 4(1), (2), (6), O. 92 r. 4

Other source(s) referred to:

Halsbury's Laws of England, 4th edn, vol 36, para 32
Jeffrey Pinsler, *Civil Procedure*, 1994 edn, pp 239, 240
Sarkar on Evidence, 13th edn, p 911

For the plaintiff - Jayanthi Pillay; M/s Kadir, Andri Aidham & Partners
For the defendant - Fong Teng Fook; M/s Yusuf Khan & Fong

Reported by Usha Thiagarajah

JUDGMENT

Abdul Malik Ishak J:

Introduction

The plaintiff's solicitors by the name of Messrs Kadir, Andri Aidham & Partners gave notice in writing to the defendant's solicitors by the name of Messrs Yusof Khan & Fong wherein the plaintiff's solicitors would request the presiding judge of the High Court to give the necessary directions to the effect, *inter alia*, that the defendant is to begin the trial of this action. That notice was dated 28 February 2003 and it was worded as follows and it can be seen in encl. 23:

> We note from the defence (that) you filed on behalf of your client that there is no denial of the fact that the Term Loan facility of RM12 million was advanced to your client. Your client's defence is one of avoidance only in that you claim that your client is not liable under the Term Loan facility Agreement of 9th June 1997 to repay the said term loan to our client for the reasons as set out in your client's Statement of Defence.
>
> That being the case we write to give you notice that since the burden of proof of all the issues in the above action lies on your client the Defendant, we shall be requesting the Judge to ask you to begin the trial.
>
> Kindly be informed accordingly.

Should I order the defendant to begin the trial? I think, I should.

Analysis

Briefly put, the plaintiff seeks under O. 35 r. 4(1) of the Rules of the High Court 1980 ("RHC") for the direction of this court that the defendant should begin opening his case as the burden of proof on the pleadings lies with the defendant. Order 35 r. 4(1) of the RHC states as follows:

> **4 Order of speeches (O. 35 r. 4)**
>
> (1) The Judge before whom an action is tried may give directions as to the party to begin and the order of speeches at the trial, and, subject to any such directions, the party to begin and the order of speeches shall be that provided by this rule.

and it confers on the Judge of the High Court the necessary power to give directions pertaining to:

(a) the party who should begin; and

(b) the order of the speeches in the course of the trial.

According to the case of *Seldon v. Davidson* [1968] 2 All ER 755 CA, the party who should begin would be the party on whom the burden of proof on the pleadings lies. That was a Court of Appeal case with a coram of Willmer and Edmund Davies LJJ, and the facts may be stated as follows. By cheques drawn on 16 February and 16 March 1966, the plaintiff paid to the defendant, who was then her chauffeur-handyman, sums totalling 1,550 pounds to buy himself a house, which he did. Subsequently, the plaintiff demanded repayment of the money. The defendant refused and the plaintiff brought an action in the county court to recover it. In his defence, the defence admitted receipt of the money but alleged that it was a gift, alternatively that it was not repayable at the date of issue of the writ. On appeal against a ruling of the county court that the burden of proof lay on the defendant, having regard to his admission of having received the money and that he therefore, should begin, it was held by the Court of Appeal that assuming that an appeal lay against such a ruling, the burden of proof was on the defendant, who should therefore begin because in the absence of any circumstances tending to show that a presumption of advancement arose or that the money had been paid in settlement of an existing debt or that the cheques were given in return for cash, the admitted payments imported a prima facie obligation to repay. Willmer LJ, writing a separate judgment, had this to say at p. 757 to p. 758 of the report:

> The way I look at it is this. Payment of the money having been admitted, *prima facie* that payment imported an obligation to repay in the absence of any circumstances tending to show anything in the nature of a presumption of advancement. This is not a case of father and child, or husband and wife, or any other such blood relationship which could have given rise to a presumption of advancement. Counsel for the defendant who has argued the case in support of the appeal, was constrained to admit that the house, which had been bought with the aid of the money paid by the plaintiff, is no doubt *prima facie* subject to a resulting trust in favour of the plaintiff. That being so, it would be strange indeed if the same considerations did not apply to the money paid by the plaintiff to the defendant to assist him in the purchase of the house.
>
> There is very scanty authority on this subject. The researches of counsel took us back to the year 1801, and we were referred to *Cary v. Gerrish* [1801] 4 Esp. 9. That was a case which no doubt bore a certain similarity to the present case, but it is, I think, distinguishable on the grounds which appear from the judgment of Lord Kenyon. When this question was discussed before him, he said (1801), 4 Esp. at p. 10):

> No evidence is offered of the circumstances under which the draft was given; it might be in payment of a debt due by the testator, or the defendant might have given cash for it at the time.

No such considerations arise in the present case; indeed, they are clearly ruled out because we have from the defendant in this case a clear admission of the payment of the money, and no suggestion that it was paid in settlement of an existing debt, or that it was given in return for cash, or anything of that sort. In the absence of any such circumstances, money paid by the plaintiff in circumstances such as these is *prima facie* repayable on demand. If the defendant seeks to evade repayment of the money which was paid to him, it seems to me that the learned judge was right in placing the onus on him to prove the facts which he alleges show that the money was not repayable.

In those circumstances, even assuming that there is a right of appeal to this court on a ruling such as was given in this case, I am not prepared to say that the judge gave a wrong ruling, and I would therefore dismiss the appeal.

Edmund Davies LJ, also writing a separate judgment, had this to say at p. 759 of the report:

Accordingly, one is really driven back to consider this matter without the assistance of authority; and, being so unassisted, I ask myself what is to be inferred as to the nature of the transaction when the simple payment of money is proved or admitted between strangers. I entirely agree with Willmer LJ, that on that bald state of affairs, proof of payment imports a *prima facie* obligation to repay the money in the absence of circumstances from which a presumption of advancement can or may arise.

Willmer LJ, has expressed the view that the loan would be repayable on demand. I would say, if not repayable on demand, at least repayable within a reasonable time of a request for repayment; and, of course, if it be the case that mere loans were made, and later on the borrower repudiates the loans and asserts that the advancements were by way of out-and-out gifts, that repudiation of the true nature of the transaction would upon any view render the loans immediately repayable.

Accordingly, assuming that this court has jurisdiction to hear this appeal, I have come to the conclusion that the ruling of the judge below was perfectly right, and that this trial should proceed on the basis that it is for the defendant to establish that which he asserts, namely, that he received the two sums of money from the plaintiff was by way of a gift.

I would therefore dismiss this appeal.

Appeal dismissed.

In the present case, the "Bundle of Pleadings", at pp. 9 to 11, sets out the nature of the plaintiff's claim against the defendant. It is far too long to reproduce the plaintiff's claim in this judgment. Suffice for me to say that the plaintiff's claim is essentially one pursuant to a term-loan facility granted to the defendant by the plaintiff at the defendant's request and in the sum of RM12 million subject to the terms and conditions set out therein.

The plaintiff in order to prove its case needs only to prove the fact that the term loan was given to the defendant and that the defendant has accepted the loan.

It is interesting to peruse through the "Statement of Agreed Facts". A perusal would show that the defendant has admitted that the loan was granted to and accepted by the defendant. There has been no denial by the defendant that he had accepted the term loan. In its original text, para. 3 of the "Statement of Agreed Facts" reads as follows:

> Melalui surat tawaran bertarikh 6hb Mac 1997 dan diikuti dengan Perjanjian Kemudahan Terma Pinjaman ('Perjanjian kemudahan tersebut') bertarikh 9hb Jun 1997, Plaintif telah memberikan Defendan suatu kemudahan terma pinjaman ('kemudahan tersebut') berjumlah sehingga RM12 juta tertakluk kepada terma-terma dan syarat-syarat di dalam surat tawaran tersebut dan diikuti dengan perjanjian kemudahan tersebut.

The language employed is clear. It is an admission that the loan was granted by the plaintiff to the defendant and such loan was accepted by the defendant. There is no dispute that the loan has not been repaid. So, there is nothing more for the plaintiff to prove to establish that a debt is due.

The statement of defence and the counterclaim of the defendant can be seen at pp. 29 to 41 of the "Bundle of Pleadings". Now, in his defence the defendant does not deny that the term loan was granted to him. There is no dispute by the defendant as to the fact that the term loan facility was granted to him by the plaintiff pursuant to a letter of offer dated 6 March 1997 which was followed by an agreement styled as the "Term Loan Facility Agreement" dated 9 June 1997. It is interesting to note that the defendant's defence is a plea known in law as "confession and avoidance". In *Halsbury's Laws of England*, 4th edn, vol. 36, at para. 32, the following passage, salient to the occasion at hand, appears:

> In effect it confesses or admits that the allegation of the other party are true, but seeks to avoid the legal inference that would otherwise be drawn from the admission by setting out fresh facts to show that in the circumstances that inference should not be drawn.

And further down the same page of *Halsbury*'s, the following short sentence appears:

> The facts relied upon as constituting an avoidance must be specially pleaded, and the burden of proof is on the party relying on the plea. (It is not sufficient merely to traverse allegations of the other party made in anticipation of a plea of confession and avoidance being raised: *Clarke v Callow* [1876] 46 LJQB 53, CA. Thus a plea that a document alleged to have been made by the party pleading is not his deed and does not bind him because its purport and effect was misrepresented to him before he made it must be specially pleaded. See RSC Ord. 18 r. 8, and para. 48, post. As to the cases in which the plea may be raised, see *Contract*, vol. 9, para. 284; *Deeds*, vol. 12, paras, 1365 et seq. Under the old system of pleading the plea by which the execution of an alleged deed was put in issue was a plea of non est factum: see eg, *Saunders (Executive of the Will of Gallie) v. Anglia Building Society* [1971] AC 1004, [1970] 3 All ER 961, HL. Under this plea the party pleading had the benefit of any variation in the deed as alleged and was entitled to the production of the deed in evidence: *Trott v. Smith* [1844] 12 M & W 688; *North v. Wakefield* [1849] 13 QB 536. This was the proper plea by which to dispute the alleged effect of the deed: *Smith v. Scott* [1859] 6 CBNS 771.

I am constrained to say that it is quite apparent that upon a reading of the defendant's defence, the defendant has clearly admitted the facts as alleged by the plaintiff and that the said facts make out a good prima facie case but nevertheless, the defendant desires to avoid liability to repay the loan by reason of matters which he must prove. This is in effect a confession by the defendant of the truth of the allegations by the plaintiff which the defendant is attempting to avoid.

I must now refer to the Evidence Act 1950, in particular ss. 101 to 103 thereof. I will now proceed to reproduce these sections in verbatim:

> **101. Burden of proof.**
>
> (1) Whoever desires any court to given judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.
>
> ILLUSTRATIONS
>
> (a) A. desires a court to give judgment that B. shall be punished for a crime which A. says B. has committed.
>
> A. must prove that B. has committed the crime.

(b) A. desires a court to give judgment that he is entitled to certain land in the possession of B. by reason of facts which he asserts and which B. denies to be true.

A. must prove the existence of those facts.

102. On whom burden of proof lies.

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

ILLUSTRATIONS

(a) A. sues B. for land of which B. is in possession, and which, as A. asserts, was left to A. by the will of C., B's father.

If no evidence were given on either side, B. would be entitled to his possession.

Therefore the burden of proof is on A.

(b) A. sues B. for money due on a bond.

The execution of the bond is admitted, but B. says that it was obtained by fraud, which A. denies.

If no evidence were given on either side, A. would succeed as the bond is not disputed and the fraud is not proved.

Therefore the burden of proof is on B.

103. Burden of proof as to particular fact.

The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

ILLUSTRATIONS

(a) A. prosecutes B. for theft and wishes the court to believe that B. admitted the theft to C. A. must prove the admission.

(b) B. wishes the court to believe that at the time in question he was elsewhere. He must prove it.

The latin phrase which is apt to the occasion is this. *El incumbit probatio qul dicit, non quit negat* which means that the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for a negative is usually incapable of proof. According

to Lord Maugham in the case of *Constantine Line v. I.S. Corpn.* [1941] 2 All ER 165, 179 that, "It is an ancient rule founded on consideration of good sense and should not be departed from without strong reasons."

The ordinary rule is this. That the burden is upon the person making the affirmative allegation. I must categorically state that the phrase "burden of proof" is not defined in the Evidence Act 1950. According to "*Sarkar On Evidence"*, 13th edn, at p. 911, the phrase "burden of proof" has:

> two distinct and frequently confused meanings: (1) The burden of proof as a matter of law and pleading – the burden, as it has been called of establishing a case. This burden rests upon the party, whether plaintiff or defendant, who substantially asserts the affirmative of the issue. It is fixed at the beginning of the trial by the state of the pleadings, or their equivalent, and it is settled as a question of law, remaining unchanged under any circumstances whatever. This rule is embodied in section 101. (2) The burden of proof as a matter of adducing evidence. The burden of proof in this sense is always unstable and may shift constantly, throughout the trial, according as one scale of evidence or the other preponderates.

In a nutshell, the burden of proof rests upon the party who desires any court to give judgment as to any legal right or liability which is dependent on the existence of certain facts which he asserts (*Nanyang Development (1966) Sdn Bhd v. How Swee Poh* [1970] 1 MLJ 145). Terrell Ag. CJ in *Selvaduray v. Chinniah* [1939] MLJ 253, 254 (CA) aptly set out the law in these salient words:

> The burden of proof under section 102 of the Evidence Enactment is upon the person who would fail if no evidence at all were given on either side, and accordingly the plaintiff must establish his case. If he fails to do so, it will not avail him to turn around and say that the defendant has not established his. The defendant can say 'It is wholly immaterial whether I prove my case or not. You have not proved yours' (see the judgment of the Privy Council in *Raja Chandranath Roy v. Ramjai Mazumdar*, 6 Bengal Law Reports, page 303).

Now, in the context of the present case, the loan is admitted and hence it is taken to have been proved. By way of analogy, the present case may be equated as far as the burden of proof is concerned to a libel action. In a libel action once the libel is admitted to have been published by the defendant, then the burden shifts to the defendant to raise his defence. In similar vein would be the Federal Court case of *International Times & Ors v. Leong Ho Yuen* [1980] 2 MLJ 86. In that case an action was brought by the plaintiff for defamation against the defendants. The defendants' defences were justification and fair comment. During the trial, the defendants had called witnesses to prove these

defences while the plaintiff did not lead any evidence in rebuttal. The learned trial judge held that the defendants had failed to establish these defences and so his Lordship gave judgment for the plaintiff. The defendants appealed and contended that the evidence adduced by the defendants had shifted the onus of proof onto the plaintiff and that as the plaintiff had not given any evidence at all on the question of justification and fair comment, the defendants had fully discharged their burden of proving these two defences. The Federal Court in dismissing the appeal with costs held that since the defendants had relied on justification and fair comment the burden of proving these two defences rested entirely upon the defendants. The Federal Court also held that having regard to the evidence which was accepted by the learned trial judge and the principles of law which operate in favour of the plaintiff, the onus of proof had not shifted to the plaintiff. The Federal Court further held that as the onus was still on the defendants to prove the truth of their imputations and as they had failed to do so, judgment was rightly given for the plaintiff. Salleh Abas FJ (as his Lordship then was) speaking for the Federal Court had this to say (see p. 87 of the report):

> The first sense, signified by the expression burden of proof such as referred to in section 101 of the Evidence Act is the burden of establishing a case and this rests throughout the trial on the party who asserts the affirmative of the issue. The appellants in the present appeal relied on justification and fair comment. Therefore, the burden of proving these defences rests entirely upon them (*Gatley on Libel and Slander* 7th Edition paras 351 and 354).

I will now refer to the case of *Juahir bin Sadikon v. Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 4 CLJ 1, a decision of the Court of Appeal with a coram of Siti Norma Yaakob, Abdul Malek Ahmad and Mokhtar Sidin JJCA. That was a case where s. 103 of the Evidence Act 1950 was considered and the Court of Appeal held that a party who alleges a fact must prove such an allegation. The allegation was that a certain representation was made by a person who was not produced as a witness to prove the allegation. The Court of Appeal held that the fact that the party who alleged that the representation was made, was unable to secure the attendance of that witness did not shift the burden to the respondent to produce the witness and testify as to what he had uttered because the respondent had never raised such an allegation and the respondent denied even making one. Siti Norma Yaacob JCA writing separately for the Court of Appeal reviewed the evidence and said (see p. 9 of the report):

From the appellant's oral testimony and that of his witness PW2, there is no evidence to conclude that Tan Sri Basir made any oral representation to the appellant that the premises would be sold to him at the price of between RM7,000-RM8,000. We therefore confirm the trial judge's finding on this. It also stands to reason that as a director of the respondent, it would not have been right and proper for Tan Sri Basir to make a commitment on the purchase price of the premises, but that the matter be brought before the full board of the respondent.

The allegation of the oral representation has been pleaded by the appellant at para 8 of his statement of claim, and denied by the respondent at para 5(a) of its amended statement of defence.

He who alleges must prove such allegation and the onus is on the appellant to do so. See s 103 of the Act. Thus, it is incumbent upon the appellant to produce Tan Sri Basir as his witness to prove the allegation. The fact that the appellant was unable to secure the attendance of Tan Sri Basir as a witness does not shift the burden to the respondent to produce the witness and testify as to what he had uttered, as firstly, the respondent never raised such an allegation and, secondly, has denied even making one. For this very reason, the adverse inference under s. 114(g) of the Act relied upon by the appellant cannot be accepted as establishing that if the witness had been produced, his evidence would work against the respondent. There is no obligation in law for the respondent to produce the witness as that obligation rests with the appellant, the party who alleges, and the fact that the appellant was unable to do so is fatal to his case. For this very reason too, the adverse inference under s. 114(g) is invoked against the appellant.

It seems to me that on the pleadings, the defendant raises several representations which are denied by the plaintiff in reply. Hence, the burden of proof remains with the defendant. I now must refer to the case of *Follagen Ltd (Trading as the Top Hat Restaurant) v. Ritjo Properties Ltd and Another* – reported in The Times 1981 and can be retrieved at http://www.lexis.com/research. That was an interesting case. In that case, what was alleged by the plaintiff was that there was a wrongful entry upon the plaintiff's property by the receiver who had been appointed under the powers conferred by a debenture. The plaintiff claimed that the appointment of the receiver was wrongly made and sought a declaration that the said appointment was wrongful and invalid and claimed for damages. It was held on appeal by Brightman LJ that as the parties had agreed that the question of liability had to be established first, the object was to confine the hearing to the issue as to whether a case had arisen for the appointment of a receiver without regard to the question of whether loss had followed from the wrongful entry if the right to appoint a receiver was

not established. On that basis his Lordship held that the onus of proof at the trial was wholly on the defendants and that therefore the defendants had to begin.

The discretion is given to me to decide under O. 35 r. 4(1) of the RHC as to which party to begin. Based on the pleadings, it is my judgment that the defendant should be directed to begin the trial. Abdul Malek Ahmad J (now FCJ) in the case of *Datuk Chen Lip Keong & Anor v. Datuk Mohd Fathi bin Haji Ahmad and Another Action* [1994] 1 MLJ 1, held that a trial judge is empowered to decide as to which party is to begin.

Now, all these cases support the plaintiff's contention that the evidential burden is on the defendant who should rightfully begin the trial before me. I have alluded to the case of *Seldon v. Davidson (supra)* and that was indeed a classic case. The defendant in the *Seldon*'s case admitted receipt of the money but alleged that it was a gift. It is no different from the facts of the present case where the present defendant admitted the loan and so there is a prima facie obligation to repay.

Another case in point would be that of *Kulandi Muthu v. Subramaniam Velliappan* [1983] 1 CLJ 302; [1983] CLJ (Rep) 603. In that case the appeal was against the decision of the magistrate in dismissing the claim of the appellant for the return of a friendly loan of RM6,000 given to the respondent. On the pleadings, the respondent had pleaded not only repayment but also overpayment and counterclaimed for the sum overpaid. The counterclaim was dismissed and there was no appeal. It was held that the magistrate had misread the pleadings and had thereby misdirected himself in law as to the burden of proof. Since the defence was in the nature of confession and avoidance and the loan having been admitted, the burden of proof was on the respondent to prove the repayment and overpayment on a balance of probabilities. It was also held that the magistrate had erred in law in making adverse inferences against the appellant instead of the respondent by the appellant's failure to call his wife and son as witnesses and for requiring further and better particulars from the appellant. In fact it was for the respondent to put forward all the relevant facts before the court as the burden of proof was on him. In regard to the issue of repayment, it was held that the magistrate's finding was against the weight of evidence. The court held that an adverse inference ought to have been drawn against the respondent under s. 114(g) of the Evidence Act 1950 for his failure to call the appellant's wife whom he had subpoenaed as a witness.

Yet another case worth referring to is the case of *J.L. Morison Son & Jones (M) Sdn Bhd v. Yee Fung Sdn Bhd* [1997] 1 LNS 340. That was a case in respect of a claim for the price of goods sold and delivered to the defendant. The defendant's defence to the claim was that the plaintiff had sent its representatives to the defendant's premises to take account of the stock of the goods to be returned to the plaintiff. The defendant therefore claimed that the plaintiff was estopped and precluded from saying that the defendant owed them the amount as claimed in the statement of claim. It was held that since the issue was whether there was an agreement for the plaintiff to take back the goods and that since it was the defendant's case that that was the case, then it was for the defendant to prove it and in fact the defendant should have commenced its case. It was further held that the defendant's defence was in the nature of a confession and avoidance which meant that the defendant had admitted the amount of the goods delivered but had sought to avoid liability by raising the defence that there was an agreement for the plaintiff to take the goods back and give credit to the defendant for it.

Then there is also the case of *Lo Khi On (Trading As Fuji Hairdressing Saloon) v. Tanjong Aru Hotel Sdn Bhd* [1994] 4 CLJ 550 that should be referred to. In that case, the plaintiff entered into an agreement with the defendants whereby the defendants' premises was let to the plaintiff for a period of three (3) years. The defendants subsequently terminated the agreement and evicted the plaintiff on the basis that the plaintiff had caused illegal activities to be carried out in the premises in breach of the agreement. The plaintiff, on the other hand, contended that the defendants' action was in breach of the agreement and claimed for damages. The defendants also counterclaimed for damages. It was held that the defendants were making all the positive assertions engendered in the issues which they had to prove whereas the plaintiff had only to prove damages. It was also held that whilst ordinarily it is the plaintiff who should begin his case pursuant to O. 35 r. 4(2) of the RHC, there are exceptions one of which is O. 35 r. 4(6) of the RHC and the other is the discretion granted to the court under O. 35 r. 4(1) of the RHC to direct who should begin. It was further held that the court would have exercised its discretion under O. 35 r. 4(1) of the RHC if the plaintiff had pressed for it because this was a suitable case to do so.

By way of a summary, the law may be stated in the following terms:

(1) The judge has the power to give the necessary directions under O. 35 r. 4(1) of the RHC.

(2) According to the case of *Seldon v. Davidson (supra)*, the party should begin on whom lies the burden of proof on the pleadings.

(3) The discretion of the judge under O. 35 r. 4(1) of the RHC to give a special direction as to the party to begin should not be fettered by the need to depart from the normal practice that the plaintiff should begin by opening his case.

(4) Jeffrey Pinsler in his book entitled "*Civil Procedure*", 1994 edn at p. 239 to p. 240 wrote the following salient passages:

Confession and avoidance

As has been seen, a party traverses an allegation of fact when he denies it or does not admit to it. The traverse is inappropriate when the party seeks to avoid the effect of an allegation which is true. In this situation, he admits to the truth of the allegation but avoids its effect through a positive allegation of his own. The defendant is doing more than simply denying the plaintiff's case; he is raising additional facts with a view to undermining the claim. This is referred to as the 'confession and avoidance' plea, and it plays an important role in the defence strategy. The defendant is stating that although the allegation is true, he is excused from liability because of specific circumstances (see *Frankum v. Lord Falmouth* [1835] 2 Ad & E 452, 4 LJKB 26; *Lush v. Russell* [1850] 5 Ex 203, 19 LJ Ex 244). For example, the defendant admits to the conclusion of a contract as alleged by the plaintiff but seeks to avoid liability by alleging that the terms were subsequently altered (see *Hemming v. Trenery* [1839] 9 Ad & E 926).

The plea is commonly made when the defendant admits to the allegation of fact but relies on a defence to exclude his liability. Thus, in an action for defamation, the defendant might admit to having published the allegedly defamatory material but couples this with a plea of justification. The defendant who is sued for trespass may admit to crossing private land but avoid liability by pleading that he was authorised. The defendant might admit to the existence of the contract but avoid any obligation under it because it is illegal. The facts on which the defendant relies to avoid liability must be fully pleaded and he will be required to prove them at the trial. Because the plea involves these additional burdens, the defence should be certain that it is an appropriate plea as opposed to a bare traverse. Even then it will be necessary to determine the exact scope of the plea. It should correspond exactly to the claim to which it is pleaded. If scope is too wide, the defence will be faced with the burden of proving additional facts unnecessarily. For example, a plea of frustration of contract should only include the precise material facts which form the basis of the plea. If it is too narrow, this will infringe the rule requiring the pleading of specific matters which may otherwise take the opposite party by surprise, or would raise issues of fact not arising out of the statement of claim.

> In accordance with the general rule, the defendant will not be allowed to prove the facts which he has not pleaded (see *Davie v. New Merton Board Mills Ltd* [1956] 1 WLR 233; and *Re Robinson's Settlement, Gant v. Hobbs* [1912] 1 Ch 717, at page 728).
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> The defendant may combine a traverse of the allegation with a confession and avoidance plea in the alternative. In this situation, the traverse is followed by the confession and avoidance plea in a separate paragraph. (The various defences must be pleaded separately and distinctly: *AG v. Lord Mayor of Sheffield* [1912] 106 LT 367). Such an approach allows the defendant to challenge the plaintiff's case on two alternative grounds. First, by denying the truth of the facts alleged. Second, on the assumption that the facts are true, by pleading additional facts to exclude and thereby avoid liability which would otherwise arise from those facts. The defendant might deny the allegation that he acted in a particular manner in one paragraph (the bare traverse). In the next paragraph, he might plead 'if, which is denied, he did so act, he was entitled to do so because …'. If there is no traverse of the allegation and the defendant merely pleads confession and avoidance, he will be bound by his confession. To avoid liability, he will have to prove the additional facts which he has pleaded (see *Hewitt v. Macquire* [1851] 7 Exch 80).

And I gratefully adopt these salient passages.

Yet another case in point would be that of *Tetangga Akrab Sdn Bhd v. Tuan Jawie & Ors* [2002] 4 CLJ 171, where the court was concerned with the claim of native customary rights under s. 5(7) of the Sarawak Land Code 1958 and the court ruled that the burden was on the defendants to prove their native customary rights over the lands in question.

It is said that if the plaintiff is to begin the case, the plaintiff would be prejudiced in that the plaintiff would be required to anticipate every aspect of the defendant's defence even before the defendant has made out a defence based on what the defendant has stated in his statement of defence. It seems to me that that is a correct assertion to make. Indeed the plaintiff is required to conjecture as to what the defendant's evidence may be like and the plaintiff would be placed in a quandary if it is asked to begin the case first. But if the defendant is required to begin the case first, would not the defendant be deprived at the close of the plaintiff's case to choose to submit that there is no case to answer on the grounds that the plaintiff's claim is lacking in its legal elements or that the plaintiff's claim is so unsatisfactory that its case against the defendant has not been discharged? So, as I see it, it is entirely dependent on the facts of each case whether the court should rule that the defendant should

begin its case first. Ordinarily, it is the plaintiff who should begin its case so that the defendant would be given the right, at the close of the plaintiff's case, to choose to submit that there is no case to answer. In such a situation, the judge is required to put counsel who desires to make a submission of no case to his election and the judge is entitled to refuse to rule unless counsel elects to call no evidence. Where counsel has so elected not to call evidence then that counsel is bound. Here, I am asked to make a ruling in view of the nature of the pleadings that the defendant should begin his case first. Each case must be decided on its own set of facts. The facts of the present case certainly calls for a ruling that the defendant should begin his case first.

I am constrained to say that it is quite rare for the defendant to choose to submit that there is no case to answer at the close of the plaintiff's case. It is always undesirable for a judge, being a judge of fact, to make any ruling on the evidence until the evidence is completed (*Alexander v. Rayson* [1936] 1 KB 169).

Here, in the context of the present case, the defendant has not denied that the term loan was granted to the defendant by the plaintiff. Here too the defendant has not denied that he had accepted the loan and received the money. Pure and simple, the defendant's defence is one of confession and avoidance. The defendant confesses that he took the money but claims that he is excused from repaying because of independent facts. So with this kind of scenario, the plaintiff is right when it says that the defendant should prove those independent facts first before the plaintiff is called upon to answer them. I say with some measure of certainty that the defendant is bound to prove the existence of those independent facts and so the burden of proof of those facts must lie with the defendant. It is to save time and expense that the defendant should begin his case first.

A submission was made by the learned counsel for the defendant to the effect that this court should defer making a ruling as to which party should begin the case first until the case management of this case is fully completed. With respect, I beg to disagree. Case management under O. 34 r. 4(2)(a) to (m) of the RHC is an ongoing process and this court will only fix the date for hearing of the whole suit after the parties have complied with all the directions of this court. In the meantime the parties are free to file any interlocutory applications and the courts are required to hear those interlocutory applications expeditiously.

It is wrong to say that the plaintiff was relying on the inherent powers of this court under O. 92 r. 4 of the RHC in order to bolster up the plaintiff's application under O. 35 r. 4(1) of the RHC. In reality, the plaintiff merely relies on O. 35 r. 4(1) of the RHC in seeking this court's ruling as to which

party to begin first. The plaintiff says that the defendant should open his case first whereas the defendant implores this court to direct the plaintiff to begin its case first.

It seems to me that the defendant is saying that it is incumbent on the part of the plaintiff to prove that the defendant had requested for the term loan facility. It is, with respect, a submission that can readily be dismissed as misconceived. In reality, the defendant has signed the term loan facility and had accepted the consideration. There is no necessity for the plaintiff to prove that it was the defendant who had requested for the loan. As alluded to earlier, the defendant has admitted that the term loan was granted to him and that he had accepted the loan and had received the money. There is no requirement, in law, for the plaintiff to prove that the defendant had requested for the term loan facility when there is a clear acceptance of that facility. A person's obligation to repay money is not dependent on proving that he asked for that money. It needs only to be shown that that person took the money and accepted the terms upon which he took it. Here, on the pleadings, the defendant admits the terms of the loan and the fact that he has taken the money.

There are passages in *Bullen and Leake and Jacob's Precedents of Pleadings*, 12th edn which merit reproduction. At p. 4 thereof, the following passages appear:

> Any fact in the statement of claim which is admitted in the defence, because it is expressly admitted or because it is impliedly admitted by the omission of the defendant to traverse it expressly, ceases to be in controversy between the parties, and no evidence will be required or admitted to prove such fact; and accordingly, only those facts stated in the statement of claim which are expressly traversed in the defence will remain in issue between them. The defendant, however, need not confine himself merely to traversing what the plaintiff has alleged or raising an objection in point of law to the claim of the plaintiff; he may himself raise fresh facts or matters in answer to the claim of the plaintiff. If he intends to do so, he must clearly and explicitly inform the plaintiff of the nature of his defence and the material facts on which he relies, and for this purpose he must himself take the positive and assertive position in his defence either by pleading what is called a 'confession and avoidance,' ie, confessing or admitting the facts alleged and avoiding their effect by stating fresh facts or grounds which afford an answer to them, or by pleading any other special defence on which he relies to destroy or defeat the claim of the plaintiff.

Again at p. 89 of the same book, the learned authors had this to say:

> A plea of confession and avoidance may be, and often is, raised as an alternative to a traverse of the allegations made in the statement of claim, and this is the safe course, as the defendant gets the best of both worlds, since he denies those allegations, but alternatively confesses and avoids them. If, however, the plea of confession and avoidance is the sole plea to such allegations, the defendant will be bound by his confession, and will be precluded thereby from denying the facts as alleged in the statement of claim (*Hewitt v. Macquire* [1851] 7 Exch. 80).

The sum total of all these passages would be this. It weighs heavily against the defendant.

Conclusion

For the reasons as adumbrated above, I must now make a ruling. It is this. That the defendant ought to begin his case first.